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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 1037

In the Matter of
HERBERT LEE TIMMERMAN, JR.,
Bankrupt.

JAMES J. DONOHUE,
Defendant-Petitioner,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

James J. Donohue, Petitioner herein, prays that a Writ of Certiorari be issued to review the order of the Circuit Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Eastern District of Wisconsin adjudging him guilty of criminal contempt of Court for violation of Section 41 of the Bankruptcy Act, 11 U. S. C. A. Section 69, in proceedings held pursuant to Section 21(a) of the Bankruptcy Act, 11 U. S. C. A. Section 44(a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this case has not yet been published, but it is copied in Appendix A (post p. 10).

The Order made and filed on December 22, 1961, in the United States District Court for the Eastern District of Wisconsin, the Honorable KENNETH P. GRUBB, District Judge presiding, appears in Appendix B (post p. 16).

JURISDICTION

The Order of the Honorable Judge GRUBB of the District Court for the Eastern District of Wisconsin was made and entered on December 22, 1961, and the Order of the Circuit Court of Appeals for the Seventh Circuit was made and entered on May 11, 1962.

Jurisdiction of this Court is invoked under the provisions of Title 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does Section 41(a) of the Bankruptcy Act (11 U. S. C. 69) make it mandatory that a creditor of a bankrupt appearing as a witness under a 21-a examination be paid or tendered his lawful mileage and fee for one day's attendance before he can be compelled to answer any questions put to him at said examination?

2. Is a creditor of a bankrupt who appears as a witness at a 21-a examination entitled to have his counsel, who appears with him at said examination, participate in his behalf?

3. In a prosecution for criminal contempt, when the creditor-witness being charged appears at the trial with

his counsel ready to defend against the charges, is it proper for the Court to make a finding of guilty when the defendant has not been allowed to make a formal plea of not guilty and when the prosecution offers absolutely no oral testimony and introduces no exhibits or no evidence whatsoever and thereby fails to carry the burden of proof required to establish guilt beyond a reasonable doubt?

4. When a creditor of a bankrupt is called to testify as a witness at a 21-a examination and the following circumstances occur:

a. Said witness is not first paid or tendered his lawful mileage and fee for one day's attendance at said examination.

b. Said witness is denied the right to have his counsel who is present with him take part in the examination or participate in the examination in any manner.

c. The interrogator inquires into the merits of the witnesses' claims against the bankrupt.

and, having been cited for contempt by the referee in bankruptcy, such creditor-witness appears before the District Court as a defendant to answer such charges with his counsel and the following circumstances then occur:

a. The defendant is not asked to enter a formal plea but is prepared to defend against the charges.

b. The prosecution offers no testimony or exhibits and introduces no evidence whatsoever but rests on the certificate of the referee.

c. The "hearing" consists only of brief opening statements by counsel on both sides wherein defendant's counsel does not admit to the charges made.

then, under such circumstances, when the Trial Court makes a finding of guilty and imposes a One Hundred Dollar fine in punishment against the defendant, is there a violation of the defendant's rights to due process of law as guaranteed by Articles V and XIV of the Amendments to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES OR REGULATIONS INVOLVED

ARTICLES V and XIV—Amendments to the United States Constitution: and Article I, Section 8 of the Wisconsin Constitution provides:

> *"No person shall be deprived of life, liberty, or property without due process of law."* (The defendant was found guilty and fined without due process of law.)

Section 41(a) of the Bankruptcy Act (11 U.S.C. 69) provides that a witness at a 21-A examination must be "first paid or tendered his lawful mileage and fee for one day's attendance" before he be required to *"attend as a witness before a referee"*. (There is no showing of such payment or tender.)

Section 41(b) of the Bankruptcy Act (11 U.S.C. 69) provides that in a trial for criminal contempt the Judge must *"hear the evidence as to the acts complained of"* and only if the evidence is *"such as to warrant him to do so"* shall the defendant be punished for contempt. (The Trial Court did not "hear any evidence as to the acts complained of".)

Section 21(a) of the Bankruptcy Act (11 U.S.C. 444) authorizes examination of the witness, but *"only concern-*

ing the acts, conduct, or property of a Bankrupt". (Inquiry was made into the merits of the creditors' claim.)

Section 955.08 of the Wisconsin Statutes provides:

> *"If on the arraignment the defendant fails or refuses to plead, a plea of not guilty shall be entered".* (No plea having been requested or made it should be deemed that this defendant who stated, "I'm going to fight for my rights," has entered a plea of not guilty.)

STATEMENT OF THE CASE

The petitioner, James J. Donohue, appeared before Honorable HOWARD W. HILGENDORF, Referee in Bankruptcy, on November 16, 1961, pursuant to an Order for 21-A Examination. On said date at 2:30 P.M. Martin Gedlen, the duly appointed attorney for the trustee herein, proceeded to conduct said 21-A Examination.

After a short period of questioning, the Referee, Howard W. Hilgendorf, adjourned the proceedings and notified the petitioner that he would cite him for contempt. This proceeding commenced on December 12, 1961, when the said Referee filed with the Court a Certificate of Contempt as to James J. Donohue, the petitioner herein. On said day, Honorable Kenneth P. Grubb, ordered the said James J. Donohue to show cause why he should not be punished for contempt of Court by reason of the facts certified, returnable on December 21, 1961. The hearing was called on that date before Judge Kenneth P. Grubb. No testimony was taken and no evidence was offered. James J. Donohue appeared personally and represented by his attorney, Sydney M. Eisenberg, and appearing for the United States was Assistant United States Attorney Philip L. Padden. The Court issued an Order

dated December 22, 1961, wherein the Court stated in part as follows:

> ". . . having the benefit of oral argument by the respective attorneys, and having examined the records and official transcript of testimony taken of James J. Donohue by Valerie J. Radtke, Court Reporter, on November 16, 1961, and otherwise being fully advised in the premises,
>
> IT IS HEREBY ADJUDGED, that James J. Donohue was, by his conduct, guilty of criminal contempt of Court and
>
> It is the Judgment and sentence of this Court, that James J. Donohue be fined the sum of $100.00 and James J. Donohue is hereby further ordered and directed to appear at the Bankruptcy Court for a continuation of the 21-A Examination previously held on November 16, 1961, at such time as the Referee in Bankruptcy may designate."

The petitioner appeals from this Order.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Federal Jurisdiction in the Court of First Instance is not disputed and was invoked by Section 2 of the Bankruptcy Act (11 U. S. C. 11).

ARGUMENT TO SUPPORT ALLOWANCE OF THE WRIT

It is respectfully submitted that in furtherance of an orderly and uniform system to conform with our established concept of jurisprudence this Honorable Court should answer the questions herein raised and thereby provide precedence which will tend to promote the rights

of our citizenry to equal protection under the laws of this country.

Even slight deviation from legal modes of procedure may eventually result in illegitimate and unconstitutional practices. See dissenting opinion Mr. Justice Frankfurter in *Shapiro vs. U. S.*, 335 U. S. 1, at p. 69, 68 S. Ct. 1375, at p. 1410.

This Court has held that the requirements of the due process clause of the Fifth and of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty and accused may ultimately be found to be after guilt has been *established in accordance with the procedure demanded by the Federal Constitution. Chessman vs. Teets,* 354 U.S. 156, 1 L. ed. 1253, 77 S. Ct. 1127.

The defendant seeks this Writ in good faith and sincerely believes that in the proceedings which gave rise to the charge against him and the manner whereby he was found guilty and punished by fine contained a manifest failure to observe that fundamental fairness essential to the very concept of justice. This constitutes denial of due process. *Lisenba vs. California*, 314 U. S. 219, 86 L. ed. 166, 62 S. Ct. 280.

This Court has held that due process of law precludes defining, and thereby confining, the standards required more precisely than to say that prosecutions can not be brought about by methods that offend "a sense of justice." *Rochin vs. California,* 342 U. S. 165, 72 S. Ct. 205.

It is respectfully submitted that the examination of the defendant although held under the authorization of Section 21(a) of the Bankruptcy Act, 11 U. S. C. A. 444, in view of the fact that the witness was a creditor with a

claim against the bankrupt and because of the precise questions which were put to the defendant, was, in substance and effect, an adverse proceedings against the defendant and constituted an improper inquiry into the merits of the creditors' claim. Refusal to let the witnesse's attorney participate and raise seasonable objection to errors and irregularities as required by Rule 32(c)(2) resulted in a clear violation of the defendant's rights. See *In re Emigh,* 243 F. 988.

It is further submitted that the authority recited in *In re Haring (in re Holden),* 203 Fed. 229, cert. den. 229 U. S. 621, provides that the certificate of the referee is only the means whereby the Judge is informed of the alleged contempt. This certificate is not binding upon the Judge nor does it conclude his action in any way. Further, in *Matter of McIntosh,* 73 F. (2d) 908, it was held that in a prosecution for criminal contempt, the certificate of the Referee is nothing more than a pleading which the bankrupt is called upon to answer, and if he does so by a plea of not guilty, *the burden of establishing his guilt beyond a reasonable doubt lies with the prosecution, which must thereupon introduce evidence.*

CONCLUSION

In conclusion, thePetitioner respectfully requests that this Honorable Court grant the Writ of Certiorari to the end that all the questions raised on this appeal be fully answered and to the further end that the best interests of justice be served. In addition, there exists a conflict of laws relating to the questions involved and this Court should resolve such conflict.

It is important to our country that it not be permitted for convictions to become more important than the preser-

vation of the guarantees of Articles V and XIV of the amendments to the United States Constitution—whose counterparts are found in the Bill of Rights, United States Constitution. Our laws and our Courts were created and instituted primarily to protect and enforce the private rights of individuals.

It is respectfully submitted that a Writ of Certiorari should be directed herein to the United States Court of Appeals for the Seventh Circuit and that in due course the issues be passed upon by this Honorable Court.

Respectfully submitted,

SYDNEY M. EISENBERG
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1131 W. State St.
Milwaukee, Wisconsin
Attorneys for Petitioner

CERTIFICATE

I hereby certify that a printed copy of the foregoing, together with the Appendix, have been served on the United States Attorney for the Eastern District of Wisconsin, the Attorney General of the United States, and the Solicitor General of the United States, by placing copies of same in the United States Mail, directed to them at their respective offices, postage prepaid.

Dated at Milwaukee, Wisconsin, this 7th day of June, 1962.

Edwin A. Star

APPENDIX A

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 13609 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

In the Matter of
HERBERT LEE TIMMERMAN, JR.,
Bankrupt.

JAMES J. DONOHUE,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

May 11, 1962

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendant, James J. Donohue, has appealed from an order of the district court adjudging him guilty of criminal contempt of court for a violation of § 41 of the Bankruptcy Act, 11 U.S.C.A. § 69, in proceedings before Howard W. Hilgendorf, a referee in bankruptcy, held pursuant to § 21 (a) of the Bankruptcy Act, 11 U.S.C.A. § 44 (a).

It appears from the record that defendant appeared as a witness before said referee in bankruptcy, in the matter of Herbert Lee Timmerman, Jr., bankrupt, on November 16, 1961. Defendant was interrogated by attorney Martin Gedlen representing the trustee in bankruptcy. Defendant was represented by attorney Paul Runkel.

The questions put to defendant pertained to certain alleged assets of the bankrupt who operated a tavern in premises owned by defendant. Much of the examination dealt with what the trustee's attorney referred to as an inventory made by the bankrupt. Numerous answers of defendant were, according to the referee, not responsive to the questions and resulted in the referee stating that, if defendant did not answer the questions, he would be cited for contempt. The record, as filed in the district court, and the referee's certificate, both show that defendant stood up and faced the referee, pounded his fist on the bench, and answered in a loud voice: "Then cite me for contempt! This is still America and I won't be pushed around by anybody." Thereupon the hearing was adjourned and defendant was cited for contempt.

In his certificate the referee certified that on five separate occasions during the course of such examination he "found it necessary to admonish said James J. Donohue and to direct him to answer certain questions put to him by the examiner, all of which appear in the official transcript hereto attached; * * * [defendant] did at and during the course of such proceeding act and conduct himself in a manner disrespectful to the Court as heretofore related and did wilfully fail to answer proper questions put to him by an authorized examiner after I had directed him to do so, all of which conduct I deem to be in contempt of Court, and I therefore respectfully request that

this certificate be considered for further proceedings herewith."

Upon this certificate of contempt, the district court ordered defendant to show cause why he should not be punished for contempt of court by reason of the facts so certified.

The order to show cause having been duly served on defendant, it appears from the record that he appeared before the district court and, upon the certificate and rule to show cause, defendant being represented by counsel, the court heard the arguments of the respective attorneys, examined the record and official transcript of testimony, entered an order which adjudged defendant guilty of criminal contempt of court, and sentenced him to pay a fine of $100. This appeal followed.

1. It is defendant's contention that the evidence, as shown by the record, of the acts complained of is not adequate and such as to warrant the judge to make a finding of guilty of criminal contempt against him.

It is unnecessary to repeat the recital of defendant's conduct as shown by the referee's certificate and the record of proceedings. There is present in the record substantial evidence to support the court's finding of contempt. That is sufficient. *Haimsohn v. U.S.*, 6 Cir., 2 F. 2d 441; *Davidson v. Wilson*, 3 Cir., 286 F. 108, 111.

Among the cases cited by plaintiff is *In re Eskay*, 3 Cir., 122 F. 2d 819, which quotes from *In re Schulman*, 2 Cir., 177 F. 191, which we have found helpful. Schulman, a bankrupt, was adjudged guilty of contempt of court for refusing to answer questions before a referee, who certified the matter to the district court. The court of appeals said, at 192:

"The questions of fact presented by this appeal are peculiarly within the province of the referee and District Judge. * * *"

The court then pointed out:

"* * * The referee, on the contrary, had an opportunity to see and hear the bankrupt and observe his manner while testifying, which is an inestimable advantage in cases of this character. The testimony of a witness may sound plausible when read afterwards from a printed book and yet his conduct on the stand may have been such that no one who heard him testify believed that he was telling the truth. * * *"

The court then pointed out, at 193:

"Disingenuous and evasive as his testimony appears when read, it is obvious that the opportunity to 'watch' the bankrupt gave the referee a very marked advantage in determining whether he was acting honestly. His answer 'I don't remember,' and 'What do you mean?' so often given might in some instances have been the result of a defective memory or an honest inability to understand. An appellate court may be unable to detect, under such conditions, the false from the true, the honest from the fraudulent, but any intelligent person, after observing the witness for hours on the stand could not be deceived as to his purpose.

"The testimony as it appears in the record evinces a deliberate purpose to conceal the truth and prevent the trustee from becoming possessed of facts which would lead to a recovery of the missing property. The witness was being asked regarding transactions directly within his knowledge and facts which he must have known. When, therefore, he answered repeatedly 'I don't remember,' it is obvious that he was deliberately withholding information to which the trustee was entitled. In effect his attitude was one of defiance. He did not affirmatively tell the referee

that he refused to disclose the facts which would enable the trustee to follow the property, although these facts were well known to him, but his conduct produced the same result as if he had stated his purpose openly."

The court affirmed the contempt order in that case.

What was said by the court in *Schulman* indicates that it is the law that the district court in adjudicating upon a charge of criminal contempt has a right to take into consideration the effect which the witness's conduct had upon the referee before whom the testimony was received.

2. Contending that there was a refusal to permit defendant to be represented by counsel at the hearing before the referee, defendant now contends that he was deprived of due process of law under the fifth amendment to the United States constitution.

The record shows that the referee advised defendant's attorney that during the pending § 21 (a) proceeding he could confer and assist his client to protect his interest, but not to hinder the proper objectives of the examination. The object of such a proceeding is to enable the trustee or any creditor to discover assets of the estate.

The examination of defendant as a witness was for the purpose of eliciting information relevant in the administration of the bankruptcy estate. No adverse proceeding against defendant was pending or apparently even contemplated.

There is a convenient collection of authorities in *In re Emigh*, 243 F. 988, in which the court held, at 991, that, as to matters not involving the merits of the claims of a witness against a bankrupt estate, there was no objection to a full and complete examination of the witness under § 21 (a), in the absence of counsel for such witness. To

the same effect is *In re Bogen*, 19 F. 2d 935. In the case at bar, if the examination of defendant had been conducted as an incident of an adverse proceeding against defendant, a different situation might have been presented.

We have considered all of the errors assigned by defendant and we find no error in this record. Therefore, the order from which this appeal has been taken is affirmed.

ORDER AFFIRMED.

No. 13609

KILEY, *Circuit Judge*, concurring. The court's opinion does not answer defendant's argument that the District Court did not "hear the evidence as to the acts complained of" as required by § 41 (b) of the Bankruptcy Act.[1] The answer is that the Government rested its case upon the referee's certificate and the transcript of proceedings, before the referee, filed with the court; the record does not show a "plea of not guilty" as there was in *In re McIntosh*, 9 Cir., 73 F. 2d 908, cited by defendant, and defendant made no offer of evidence at the hearing; and on what was before the District Court as recited in its order there was sufficient evidence to sustain the finding of guilt.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

[1] 11 U.S.C. § 69.

APPENDIX B

ORDER OF U. S. DISTRICT COURT

(Filed December 22, 1691)

Upon the certificate of contempt by the Honorable Howard W. Hilgendorf, Referee in Bankruptcy, and pursuant to the provisions of Section 41(b) of the Bankruptcy Act, James J. Donohue was ordered and directed to appear before the undersigned United States District Judge in his Court Room, Room 376, Federal Building, Milwaukee, Wisconsin, on the 21st day of December, 1961, at 9:30 a.m. to show cause, if any, he had, why he, the said James J. Donohue should not be punished for contempt of court by reason of his conduct before the Honorable Howard W. Hilgendorf, Referee in Bankruptcy on November 16, 1961, and that on said 21st day of December, 1961, James J. Donohue did appear before this court personally and represented by his attorney, Sidney M. Eisenberg and appearing for the United States was Assistant United States Attorney Philip L. Padden, and the court having the benefit of oral argument by the respective attorneys and having examined the records and official transcript of testimony taken of James J. Donohue by Valerie J. Radtke, Court Reporter, on November 16, 1961, and otherwise being fully advised in the premises,

It is hereby adjudged that James J. Donohue was, by his conduct, guilty of criminal contempt of court and,

It is the judgment and sentence of this court that James J. Donohue be fined the sum of $100.00 and James J. Donohue is hereby further ordered and directed to appear at the Bankruptcy Court for a continuation of the 21A examination previously held on November 16, 1961, at such time as the Referee in Bankruptcy may designate.

/s/ Kenneth P. Grubb

December 22, 1961. United States District Judge

APPENDIX C

WISCONSIN STATUTE INVOLVED

Sec. 955.08

Plea if accused stands mute. If on the arraignment the defendant fails or refuses to plead, a plea of not guilty shall be entered.